

The Board of Supervisors

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Contra Costa County



John Cullen
Clerk of the Board
and
County Administrator
(925) 335-1900

December 3, 2007

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Attn: Jerrie Moore, Legal Assistant

RE: Comments on Proposed Rules, Facility License Standards, 25 CFR, Parts 502, 522, 559 and 573 (Doc. E7-20541, published in the Federal Register on October 18, 2007, Volume 72, No. 201).

Dear Chairman Hogen and Commissioners:

Contra Costa County, California appreciates the opportunity to submit comments on the National Indian Gaming Commission's proposed rules on facility standards. The County strongly supports the stated intent of the rules to:

- Protect the environment and public health and safety in the construction, maintenance and operation of gaming facilities; and
- Ensure gaming only on eligible Indian Lands, pursuant to the Indian Gaming Regulatory Act ("IGRA") 25, U.S.C. § 2701 *et seq.*

As stated by the Commission in the proposed rules, the rights of tribes to develop their own laws and to govern must be viewed in conjunction with the IGRA mandate that tribal governments and the NIGC *both* have a responsibility to ensure that a gaming operation does not pose a risk to the environment or public health and safety. The Commission then goes on to state that the current Interpretive Rule does not assist the Commission in identifying *what* environmental, public health and safety laws apply to each gaming operation and that the Rule does not ensure enforcement of those laws by tribes. The proposed rules are intended to remedy the deficiencies.

Contra Costa County believes that the issuance of the proposed rules provide an opportunity for the Commission to achieve its stated objectives by fixing the current disconnect between the environmental review process required by the National Environmental Protection Act and the implementation of casino projects. Since an Environmental Impact Statement ("EIS") includes detailed information on construction, operation and maintenance standards of a proposed gaming facility as well as mitigation of off-reservation impacts of a project, it would

be the appropriate basis for determining the scope and content of required laws, resolutions, codes, policies and/or procedures ("standards") under these proposed rules.

Contra Costa County has participated as a cooperating agency in one such environmental review process and so can speak with experience and authority from a local government perspective.

The County respectfully requests amendments to the proposed rules, as detailed below.

Section 502.22 Definition of Construction, Maintenance and Operational Standards

This definition should be expanded to be consistent with the environmental review process under NEPA. This could be accomplished by the addition of the following language to subdivision (f): "If an Environmental Impact Statement was prepared for the gaming facility, then the laws, regulations, codes, policies or procedures in this area shall cover, at minimum, the construction, operational and maintenance standards identified in the EIS as well as mitigation measures that address the environmental consequences of the facility."

Section 559.2 Notification of Possible New Facility License

As proposed, written notice of a potential facility license is submitted to the Chairman only for *new* gaming operations. Consequently, it would be possible for a tribe to substantially enlarge a facility without any prior notice. For example, a tribe with a gaming facility with 100 Class II machines could add 1,000 new Class II or Class III machines without notice. Yet, there is a strong correlation between the size of a facility and protection of the environment, public health and safety. Consequently, the NIGC should also be notified whenever there is a substantial increase in operation of an existing facility. We would recommend a definition of "substantial increase" as either a 25% increase in the number of Class II or Class III machines or an increase of more than 150 machines, whichever is less.

In addition, the notification to the Chairman does not include any notification to surrounding local governments or state government. Yet, the operation of a new or substantially enlarged facility could have significant off-reservation impacts that affect those governments' abilities to comply with federal regulations (such as, for example, water quality standards) with subsequent environmental degradation. There also could be increased demands on nearby infrastructure and governmental services that affect the environment, public health or safety. Consistent with the principles of good government-to-government relations, a copy of the tribe's notice to the Chairman should be sent to the governing boards of the county and any city immediately adjacent to or surrounding the facility ("local governments") as well as the Governor of the State.

In addition, the notice should state whether the land is trust land eligible for Indian gaming under IGRA and the basis for that assertion.

Section 559.4 Submittal of Facility License

For the same reasons cited for expanded notification under Section 559.2, a copy of an issued facility license should be sent to the same government entities.

Section 559.5 Submittal Information with Facility Licenses

The Interpretive Rule states that "...the particular manner in which compliance with tribal environment, public health and safety standards is enforced is not so important. The key objective is to confirm that standards and enforcement systems are in place." (pages 46111-46112). Such confirmation requires

- Submittal of the standards to the NIGC
- Review of the standards by the NIGC
- Review of the enforcement systems by the NIGC
- Confirmation that the enforcement systems are effectively ensuring compliance with standards.

Unfortunately, as currently drafted, the proposed rules do not establish mechanisms sufficient to enable such confirmation by the NIGC. The proposed rules should be amended to do so, in the following ways.

Submittal of Standards - Without copies of the laws, resolutions, codes, policies and/or procedures used by the tribe to ensure protection of public health and safety and the environment, there is no way the Commission can determine whether or not the scope and content of those documents are adequate.

The NIGC also needs to articulate its expectation on the scope of the standards. Specifically, the listing of applicable areas under 559.5 (b) should be expanded to include all issues addressed in the Environmental Impact Statement (if one was prepared for project). Tribes, local governments, the Bureau of Indian Affairs and other stakeholders spend considerable resources in the development and review of an EIS. This will be wasted effort without a mechanism to ensure compliance with the construction, operation and maintenance standards set forth in the EIS, along with the identified mitigation measures for off-reservation impacts. Similarly, the submittal should provide information about whether or not the tribal casino project is in compliance with the land use and environmental policies and laws of the state, and if not, the submittal should identify the alternative laws and policies the tribe is following. This information is important due to potential impacts on surrounding local and state governments.

Review of the Standards – The Commission should review the standards and advise the tribe of any areas of recommended improvement. Such review is consistent with the submittal requirements for Class II and Class III ordinances under Section 522 (and, indeed, is less burdensome, since these standards are not being subjected to Commission approval).

Commission review would also provide an opportunity to foster good government-to-government relations between the tribe and surrounding local governments and the state government. The Commission should send a notice advising those governments of the standards and providing them with an opportunity for comment. Local governments are closest to the situation and would have the ability to identify potential issues before they become problems.

Review of Enforcement Systems – Currently, the Commission has no mechanism to verify that the tribe is implementing its enforcement systems and that such systems are achieving the objectives of protecting the environment, public health and safety. Consequently the proposed

rules do not ensure that the Commission will be able to meet *its* obligations under IGRA which, as stated earlier, are obligations of both the Commission and the tribe.

Financial and management audits by independent firms are a common practice in both the private and public sector. The proposed rules should be expanded to provide for independent audits by qualified, certified environmental/engineering firms, according to a schedule established by the tribe and agreed upon by the Commission. The schedule should be correlated to the location and scale of the facility, for example, a large casino in a highly urbanized or environmentally sensitive area would require more frequent audits than other facilities.

Again, in the interests of good government-to-government relations and in recognition of the off-reservation impacts of casino facilities, nearby local governments and the state should be given an opportunity to comment on the schedule.

Compliance with Standards – The independent audit should provide both the Commission and the tribe with an unbiased, objective assessment of its enforcement systems. This information would be useful to the tribe in its internal control efforts and in ensuring best practices. It would also help the Commission in fulfilling its IGRA obligations.

Again, in the interests of good government-to-government relations and in recognition of the off-reservation impacts of casino facilities, nearby local governments and the state should be given an opportunity to review the results of the audit.

Section 573 Enforcement

As currently written, Section 573 limits the order of temporary closure to operating a gaming operation without a facility license, in violation of Section 559. The Interpretive Rule is even narrower, stating that “The Commission will proceed to enforcement only where no corrective action has been undertaken [by the tribe] within a reasonable time and such inaction results in a condition of imminent jeopardy to the environment, public health and safety.” Imminent jeopardy is defined as conditions “that pose a real and immediate threat: (1) To the environment, which if uncorrected, would result in actual harm to life or destruction of property; or (2) to human health and well-being, which, if uncorrected, could result in serious illness or death.” (page 46112)

These criteria for enforcement do not ensure protection of the environment, public health and safety.

- First, there are no intermediary enforcement mechanisms: temporary closure of the gaming facility may not remedy the deficiency. Instead, the Commission should also provide for fines for non-compliance, “cease and desist orders” that address the specifics of the problem and time frames for corrective action.
- Secondly, definition of imminent jeopardy ignores the very real likelihood of cumulative, long term environmental degradation and threats to public health and safety.
- Third, the narrow circumstances under which the Commission will take action ignore the tribe’s obligation to fulfill its commitments to facility construction, operation and maintenance as set forth in the Environment Impact Statement.

In addition, the proposed rules provide for no recourse for local governments that believe that the environment, public health and safety are not being protected. Since tribes operate as independent governments, local governments have no legal standing to ensure enforcement. Nonetheless, local governments are held accountable for compliance with many state and federal environmental standards; however, such compliance may not be possible due to the operation of the casino facility. Lack of compliance can result in fines and/or corrective orders that strain the financial resources of the local government. These local governments may also experience significant increases in the demand for services and/or infrastructure due to operation of the casino facility, also beyond their financial resources.

Consequently, the proposed rules should provide for Commission enforcement actions that take into account these possible "unintended consequences" and give local governments a voice and appeal rights in the these matters.

Thank you for the opportunity to comment and for seriously considering our perspective on the proposed rules. If you would like further detail or explanation of our comments, please contact Sara Hoffman, Assistant County Administrator, at 925.335.1090.

Sincerely,

A handwritten signature in black ink, appearing to read 'MP', with a long horizontal flourish extending to the right.

Mary N. Piepho, Chair
Board of Supervisors

cc: Members, Board of Supervisors
 Senator Diane Feinstein
 Senator Barbara Boxer
 Congressman George Miller
 Congressman Jerry McNerney
 Congresswoman Ellen Tauscher
 Senator Don Perata
 Senator Tom Torlakson
 Assemblymember Mark DeSaulnier
 Assemblymember Loni Hancock
 Assemblymember Guy Houston
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 California State Association of Counties
 Northern California Tribal Matters Consortium